

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

PAUL ELKINS and KATHY ELKINS,  
husband and wife,

Plaintiffs,

v.

QBE INSURANCE CORPORATION,  
a foreign insurer;  
COMMUNITY ASSOCIATION  
UNDERWRITERS OF AMERICA, INC.,  
a foreign corporation,

Defendants.

CASE NO. C11-5150 RJB

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT AND DISMISSING  
ACTION

This matter comes before the Court on Defendants QBE Insurance Corporation (QBE) and Community Association Underwriters of American, Inc.'s, (CAU) motion for summary judgment. Dkt. 11. The Court has considered the pleadings in support of and in opposition to the motion and the record herein.

## INTRODUCTION AND BACKGROUND

As a preliminary matter, Plaintiffs assert that this motion is governed by an amended complaint that names two additional Plaintiffs, Kim Jorenson and Jay Gruenfeld. Dkt. 14 pp. 1-2; Dkt. 14-1 pp. 1-2. The addition of these additional Plaintiffs does not alter the Court's analysis and to the extent they are proper parties to this action, this Order is binding on their interests.

The material facts are largely undisputed. Dkt. 13 pp. 2. Harbour Commons Condominiums are commercial office condominiums located in Gig Harbor, Washington. Dkt. 1-1 pp. 7. Plaintiffs own office units located in the Harbour Commons Condominiums building and leased those office units to commercial tenants. *Id.* On January 15, 2009, Plaintiffs' units in the Harbour Commons Condominiums were damaged by fire. *Id.* QBE issued Policy No. CAU 210764-4 to Harbour Commons, A Condominium, which was effective at the time of the fire. *Id.*

QBE has paid policy proceeds because of the loss to the building and units as a result of the fire. There is no issue regarding the claim of loss to the building. Dkt. 11 pp. 3-4

Plaintiffs sought recovery of insurance proceeds against QBE for loss of rental income to their two commercial condominium office units that were damaged as a result of the fire. Dkt. 1-1 pp.7. QBE declined to pay Plaintiff unit owners (the Elkins) for loss of rental income after the fire, asserting that the policy was issued to the condominium association and does not provide insurance for loss of income to the unit owners. Dkt. 11 pp. 2. QBE contends that because Plaintiffs are not the named insured under the policy and cannot recover policy proceeds as the "named insured," QBE is entitled to summary judgment on all of Plaintiffs' claims: Breach of Contract, Violation of the Consumer Protection Act, Bad Faith and Violation of the Insurance Fair Conduct Act (RCW 48.30.015). *Id.*

1 Plaintiffs dispute this interpretation of the policy, contending that the rental loss provision  
2 is not limited to the named insured and provides for payment for loss of community income  
3 which encompasses loss of rents by individual unit owners. Dkt. 13 pp. 4-5.

4 The Office Condominium Policy declarations provision provides:

5 NAMED INSURED HARBOUR COMMONS, A CONDOMINIUM.

6 Dkt 14-4 pp. 1.

7 The Declarations provide that:

8 COVERAGE IS PROVIDED FOR ONE TWO-STORY FRAME OFFICE  
9 CONDOMINIUM BUILDING CONTAINING TWELVE PROFESSIONAL  
10 UNITS. THE PREMISES IS LOCATED AT 7512 STANICH AVENUE, UNITS  
1-5,6A-F, 7, Gig Harbor, Pierce COUNTY, WA 98335.

11 Dkt 14-4 pp. 2

12 The Property Coverage Part provides in part that:

13 Throughout this policy the words "you" and "your" refer to the  
14 Named Insured shown in the "Declarations."

15 Dkt. 14-4 pp. 5.

16 The coverage provision at issue is set forth as follows:

17 II. PROPERTY CONSEQUENTIAL  
18 COVERAGES SECTION

19 Unless specified otherwise, coverages apply as a  
20 consequence of direct physical loss or damage to  
21 "covered property" caused by or resulting from a  
COVERED CAUSE OF LOSS for which a limit of  
insurance is shown for such "covered property" in the  
"Declarations." The coverages in this section are only  
provided when limits of insurance are shown in the  
"Declarations."

22 ...

23 B. COMMUNITY INCOME

24 We will pay for the loss of community income,  
including loss of rent or loss of lease payments,

1 due to the suspension of your operations during  
 2 the "period of restoration." Community income  
 3 does not include maintenance fees and  
 4 assessments.

5 Dkt. 14-4 pp. 8.

### 6 SUMMARY JUDGMENT STANDARDS

7 Summary judgment is appropriate where there is no genuine issue of material fact and the  
 8 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party  
 9 bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex*  
 10 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the  
 11 opposing party must show that there is a genuine issue of material fact for trial. *Matsushita Elec.*  
 12 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A dispute as to a material fact is  
 13 "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving  
 14 party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The opposing party may not  
 15 rest upon the mere allegations or denials of the moving party's pleading, but must present  
 16 significant and probative evidence to support its claim. *Intel Corp. v. Hartford Accident &*  
 17 *Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). For purposes of this motion, reasonable doubts  
 18 as to the existence of material facts are resolved against the moving party and inferences are  
 19 drawn in the light most favorable to the opposing party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d  
 20 1130, 1134 (9th Cir. 2000). Summary judgment is mandated where the facts and the law will  
 21 reasonably support only one conclusion.

### 22 CONSTRUCTION OF INSURANCE CONTRACTS

23 Interpretation of the language of an insurance policy is a matter of law for the court to  
 24 decide. *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998). An  
 insurance policy should be construed as a whole, with the policy being given a fair, reasonable,

and sensible construction as would be given by the average person purchasing insurance. *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 427, 951 P.2d 250 (1998). When interpreting a policy's terms, words and phrases are not analyzed in isolation. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). Instead, the policy is read in its entirety and effect is given to each provision. *Peasley*, at 424. Clear and unambiguous language in an insurance policy will be enforced. Where the contract language is clear and unambiguous, the courts should not rewrite the policy under the guise of construing the language. *Batdorf v. Transamerica Title Ins. Co.*, 41 Wn. App. 254, 702 P.2d 1211 (1985). If the language of the policy is susceptible to two reasonable and fair interpretations, ambiguity exists. *Vadheim v. Continental Ins. Co.*, 107 Wn.2d 836, 840-41, 734 P.2d 17 (1987). Ambiguity must be resolved in favor of the insured regardless of the intent of the insurer. *Trans Continental Ins. Co. v. Washing Public Util. Dists' Util. Sys.*, 111 Wn.2d 452, 760 P.2d 337 (1988).

### THE HARBOUR COMMONS CONDOMINIUM POLICY

Washington requires condominium associations to maintain certain insurance coverage for condominiums. RCW 64.34.352 states that a condominium association shall maintain, to the extent reasonably available:

(a) Property insurance on the condominium, which may, but need not, include equipment, improvements, and betterments in a unit installed by the declarant or the unit owners, insuring against all risks of direct physical loss commonly insured against. \* \* \*

(b) Liability insurance, including medical payments insurance, in an amount determined by the board of directors..

The statute further provides that each unit owner is an insured person under the policy with respect to liability arising out of the owner's interest in the common elements of the association. RCW 64.34.352(3)(a). There is no statutory requirement that an association

1 provide coverage for the personal interests of unit owners. In fact, RCW 64.34.352(5) provides  
 2 that a unit owner is entitled to obtain insurance for the owner's own benefit.

3 Harbour Commons Condominiums Association filed Conditions, Covenants and  
 4 Restrictions with the Washington Secretary of State which included the following provision in  
 5 regard to the statutory mandate to maintain insurance:

### 6 ARTICLE III

#### 7 Insurance

8 1. Insurance Coverage: The Board shall obtain and  
 maintain at all times as a common expense a policy or policies  
 and bonds required to provide.

9 a. Fire insurance, with extended coverage  
 endorsement, in an amount as equal to the full insurable  
 replacement value, without deduction for depreciation, but from  
 10 any other deductions which the Board may find reasonable after  
 consultation with insurance consultants, of the common and  
 11 limited common areas and the condominium units, with the  
 Board named as insured as trustee for the benefit of owners and  
 12 mortgagees as their interests may appear, or such other fire and  
 casualty insurance as the Board shall determine to give  
 13 substantially equal or greater protection insuring the owners,  
 and their mortgagees, as their interests may appear. Said policy  
 14 or policies shall provide for separate protection for each  
 condominium unit to the full insurable replacement value  
 15 thereof, as above provided, and a separate loss payable clause in  
 favor of the mortgagee of the condominium, if any.

16 . . . . .

17 2. Owner's Additional Insurance: Each owner may  
 obtain additional insurance respecting his condominium unit as  
 contemplated under RCW 64.32.228 and 64.32.314(1) at his  
 18 own expense; no owner shall, however, be entitled to exercise  
 his right to maintain insurance coverage in any manner which  
 19 would decrease the amount which the Board, or any trustee for  
 the Board, on behalf of the owners, will realize under any  
 20 insurance policy which the Board may have in force on the  
 condominium at any particular time.

21 Dkt. 12-1 pp. 26.

22 The statute and covenants require the Harbour Commons Condominiums Association to  
 23 maintain property insurance on the common areas and units of the condominium.

1 In accordance with these provisions the Association purchased the subject insurance policy.

2 QEB has paid policy proceeds because of the loss to the building and units as a result of the fire.

3 The Plaintiffs presently seek recovery of lost rent pursuant to the Property Consequential  
4 Coverages Section of the policy. As noted, this provision provides payment for“loss of  
5 community income, including loss of rent or loss of lease payments, due to the suspension of  
6 your [Harbour Commons Condominiums Association’s] operations during the period of  
7 restoration.” Other than stating that loss of community income encompasses loss of rent and  
8 excludes maintenance fees and assessments, the policy does not define the term“community  
9 income.” The provision covers all loss of community income due to suspension of Harbour  
10 Commons Condominiums Association’s operations during the period of restoration.

11 **Individual Unit Owners as Members of Community**

12 Plaintiff argues that the individual unit owners are clearly part of the community and  
13 treating their loss of rent as a community loss is consistent with other parts of the policy.

14 Plaintiff cites to the Property Direct Coverages Section of the policy which provides coverage for  
15 “general community property,” which includes individual condominium units. See Dkt. 12-1 pp.

16 14. However, the direct coverage of the individual units is precisely what is mandated by statute  
17 and the Association covenants. The policy provides for the repair of units and common areas in  
18 the event of a loss, such as fire. Defendants provided coverage under the policy to the  
19 Association, as trustee, to accomplish the repairs to the Harbour Commons Condominiums after  
20 the fire. That is a practical approach to repairing what was damaged, when common areas and  
21 units have integrated components. See *Anderson v. Counsel of Unit Owners of*

1 *Gables on Tuckerman*, 404 Md. 560, 948 A.2d 11 (2008). The fact that individual unit owners  
 2 benefited from the repair of their units does not support an argument that they are entitled to  
 3 directly recover under the policy.

#### 4 **The Community and Direct Losses**

5 Contrary to the position of Plaintiffs that their individual unit rent income should be  
 6 considered“community income,”the policy as a whole limits the use of the term community to the  
 7 named insured, Harbour Commons Condominiums Association. The term“community property”  
 8 as defined in the Property Direct Coverages Section is confined to property that is owned or  
 9 controlled by the named insured. The provisions providing coverage for“Community Personal  
 10 Property”limit coverage to the named insured (i.e. indoor and outdoor furnishings, appliances,  
 11 machinery, temporary structures, etc). Dkt. 14-4 pp. 5-6. The provisions for coverage for  
 12 ‘Special Community Property’are limited to items that might be considered part of common areas  
 13 (i.e. structural glass, bridges, docks, retaining wall, satellite dishes, newly constructed buildings),  
 14 or items specifically owned by the Association (i.e. money, securities, computer and media  
 15 equipment, papers, receivables, records, etc.) Dkt. 14-4 pp. Thus, other than the mandate to  
 16 cover the repair of the units of the condominium, other direct coverages applicable to the  
 17 community property are confined to the named insured.

#### 18 **The Community and Consequential Losses**

19 The same is true under the Property Consequential Coverages Section. The coverage of  
 20 maintenance fees and assessments, accounts receivable expenses, and extra expenses incurred to  
 21 continue normal operations during restoration, are all limited to the named insured. Dkt. 14-4  
 22 pp. 8. Even more telling is the provision entitled‘Increased Period of Restoration Coverage.  
 23 Dkt. 14-4 pp. 9. This provision provides for an extension of coverage for loss of“community  
 24



1 income,"including loss of rent,"to include the amount of actual and necessary loss you sustain  
2 during the increased period of restoration of normal community operations." Dkt. 14-4 pp. 9. As  
3 previously noted, the term "you" is defined as to refer to the named insured, Harbour Commons  
4 Condominiums Association. Only the named insured is entitled to extended coverage for loss of  
5 rent.

### 6 **Community Income is Limited to the Named Insured**

7 Construing the policy as a whole, giving a fair, reasonable, and sensible construction as  
8 would be given by the average person purchasing insurance, the policy is unambiguous. The  
9 policy provides coverage for loss of community income, including loss of rent or loss of lease  
10 payments, due to the suspension of Harbour Commons Condominiums Association's operations  
11 during the period of restoration. Community income is that income attributable to Harbour  
12 Commons Condominiums Association. The policy does not provide insurance for loss of rent to  
13 the individual unit owners. There are no genuine issues of material fact and Defendants are  
14 entitled to summary judgment.

### 15 **CONCLUSION**

16 The Court having considered the motion, response, reply, and relevant documents herein,  
17 finds there are no genuine issues of fact and **GRANTS** the Defendants' motion for summary  
18 judgment. Therefore, it is hereby **ORDERED** that:

19 Defendants' Motion for Summary Judgment (Dkt. 11) is **GRANTED**. All Plaintiffs'  
20 claims against Defendants are **DISMISSED WITH PREJUDICE**.

21 Dated this 21st day of April, 2011.

22 

23 ROBERT J. BRYAN  
24 United States District Judge